

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2021-27**

July 13, 2021

**CALGARY POLICE SERVICE**

Case File Number 007659

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** An Applicant made an access request to the Calgary Police Service (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for all records relating to the Public Body's response to the *R v. Ashe*, 2009 ABPC 154 decision.

The Public Body provided responsive records with information withheld under sections 17(1), 24(1)(a) and 27(1)(a).

The Applicant requested an inquiry into the Public Body's application of sections 24(1)(a) and 27(1)(a). In the course of the inquiry, the Public Body withdrew its application of section 24(1).

The Adjudicator upheld the Public Body's claim of solicitor-client privilege under section 27(1)(a).

**Statutes Cited: AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 27, 71, 72.

**Authorities Cited: AB:** Orders F2004-003, F2007-008, F2007-014, F2010-007, F2010-036, F2012-08, F2021-12

**Cases Cited:** *Canada v. Solosky*, [1980] 1 S.C.R. 821, *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII), *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*

## **I. BACKGROUND**

[para 1] The Criminal Trial Lawyers' Association (the Applicant) made an access request to the Calgary Police Service (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) dated July 28, 2017, for all records relating to the Public Body's response to the *R v. Ashe*, 2009 ABPC 154 decision. The Applicant noted in its access request that it had brought this decision to the attention of the Public Body in December 2009, and had received a letter in response from the Public Body dated January 10, 2010, which it attached to its access request.

[para 2] The Public Body responded to the access request on December 7, 2017, providing eight pages of responsive records with information withheld under sections 17(1), 24(1)(a) and 27(1)(a).

[para 3] The Applicant requested a review of the Public Body's application of sections 24(1)(a) and 27(1)(a). Subsequent to the review, the Applicant requested an inquiry.

[para 4] In the course of the inquiry, the Public Body withdrew its application of section 24(1) to information in the records. The remaining issue at inquiry is the information withheld under section 27(1)(a), citing solicitor-client privilege.

## **II. RECORDS AT ISSUE**

[para 5] The records at issue consist of the withheld portion of pages 5 and 6 of the records at issue, provided to the Applicant on April 28, 2016.

## **III. ISSUES**

[para 6] The issues as set out in the Notice of Inquiry, dated March 25, 2021, are as follows:

1. Did the Public Body properly apply section 24(1)(a) of the Act (advice from officials) to the information in the records?
2. Did the Public Body properly apply section 27(1)(a) of the Act (privileged information) to the information in the records?

[para 7] Only the second issue remains to be decided.

#### IV. DISCUSSION OF ISSUES

[para 8] The Public Body withheld portions of two emails under section 27(1)(a), citing solicitor-client privilege.

[para 9] Section 27 of the Act states:

*27(1) The head of a public body may refuse to disclose to an applicant*

*(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*

*(b) information prepared by or for*

*(i) the Minister of Justice and Solicitor General,*

*(ii) an agent or lawyer of the Minister of Justice and Solicitor General,  
or*

*(iii) an agent or lawyer of a public body,*

*in relation to a matter involving the provision of legal services, or*

##### *Section 27(1)(a) – Solicitor-client privilege*

[para 10] The test to establish whether communications are subject to solicitor-client privilege is set out by the Supreme Court of Canada in *Canada v. Solosky*, [1980] 1 S.C.R. 821. The Court said:

... privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege--(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.

[para 11] The requirements of this privilege are met if information is a communication between a solicitor and a client, which was made for the purpose of seeking or giving of legal advice and intended to be kept confidential by the parties.

[para 12] Section 71(1) of the Act states:

*71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.*

[para 13] Therefore, the burden of proof lies with the Public Body to prove that section 27(1)(a) of the Act applies to the records at issue.

[para 14] Where a public body elects not to provide a copy of the records over which solicitor-client or litigation privilege is claimed, the public body must provide sufficient information about the records, in compliance with the civil standards set out in the *Rules*

of Court (Alta Reg 124/2010, ss. 5.6-5.8). These standards were clarified in *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII) (*ShawCor*). *ShawCor* states that a party claiming privilege must, for each record, state the particular privilege claimed and provide a brief description that indicates how the record fits within that privilege (at para. 36 of *ShawCor*).

[para 15] The role of this Office in reviewing claims of privilege was discussed in *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (*EPS*), at paras. 77-112. In Order F2021-12, the adjudicator summarized the Court's conclusion as follows (at para. 210):

My understanding, then, in light of *EPS*, *ShawCor*, and rule 5.8, is that I am to consider whether the description of a record enables me to recognize that the elements of solicitor-client privilege set out in *Solosky* are present. At that point, the Public Body will have satisfied the *ShawCor* standard and established a rebuttable presumption that the records are subject to solicitor-client privilege. Absent evidence to rebut the presumption, I must find that the records were properly withheld under section 27(1)(a). Where the standard is not met, in the absence of other evidence that would establish that the records are subject to solicitor-client privilege, I must find that the records were not properly withheld under section 27(1)(a).

[para 16] I agree with this summary.

[para 17] In this case, the withheld information on pages 5 and 6 consists of portions of the body of two emails. I do not have an unredacted copy of these emails. However, the Public Body has disclosed much of the information on these pages, including who the emails are to, from, the date, subject line, and some information from the body of the email that does not reveal the advice given but reveals the context of that advice.

[para 18] From the Applicant's access request and submissions, as well as the records that were disclosed to the Applicant, I understand that the context in which pages 5 and 6 were created to be as follows.

[para 19] The Applicant had contacted the Public Body regarding the *R v. Ashe* decision in December 2009. The Public Body Privacy Counsel and Manager, ST, responded by letter dated January 10, 2010. The Applicant provided a copy of this letter with its access request.

[para 20] Subsequently, the Applicant sent an email on December 14, 2010 to the Public Body, the Calgary Police Commission, and other recipients, requesting information about what had been done in relation to prosecuting officers involved in the *R v. Ashe* matter. The Applicant sent a follow-up email on December 28, 2010 to the Public Body and the Commission, which refers to a response it received to its first email. From the Applicant's December 28 email, the Public Body's response appears to have been from the Public Body Privacy Counsel and Manager, ST, dated December 16, 2010.

[para 21] A Public Body employee from the Public Affairs area followed up within the Public Body regarding the Applicant's December 28, 2010 email. The Public Affairs employee was directed to ST, as well as another Public Body lawyer, BF, who may have knowledge of the matter.

[para 22] The emails on page 5 and 6 respond to the Public Affairs employee. The email on page 5 was written by ST, sent to BF, the Public Affairs employee, and one other individual, who appears to be a member of the Public Body's Professional Standards Section (PSS) and who seems to have been involved in responding to the Applicant's earlier enquiries regarding the *Ashe* decision. The email on page 6 was written by BF, sent to the Public Affairs employee, and copied to ST.

[para 23] The Public Body submitted an affidavit sworn by BF, who authored the email on page 6. The affidavit states (at paras. 3-4):

On or about December 29, 2010, I was asked to consult and respond to the CPS Public Affairs Unit regarding an email received from [the Applicant]. Legal advice was sought and provided by both myself and [ST] who was CPS' Privacy Counsel at the time. My advice was very limited since I was out of the office on vacation. The bulk of the legal advice provided was by [ST].

My e-mail and [ST's] email containing her advice were protected from disclosure by section 27 of the Freedom of Information and Protection of Privacy Act. The redactions were made in Access & Privacy file number 17-G-1152 on pages 5 and 6 of the disclosure.

[para 24] Regarding the affidavit, the Applicant points out that the January 2010 letter it received from ST, which the Applicant attached to its access request, states that the Applicant's December 2009 email to the Public Body was sent to the Public Body's Public Affairs area. The Applicant states that this is unlikely, and that it likely would have sent the email to the Chief. It is not clear why the Applicant believes this is relevant to the Public Body's claim of privilege. I note that the Applicant's December 14 and 28, 2010 emails to the Public Body in the records at issue were both sent to a general email address for the Public Body, and not to a particular employee or position. In any event, the fact that a Public Body employee from the Public Affairs area was involved in the Public Body's response does not exclude the possibility that Public Body counsel provided legal advice on the matter.

[para 25] The Applicant also states that the product of the legal advice from BF and ST appears to be ST's letter of January 10, 2010, and that "[n]otably, the response did not come from CPS Public Affairs but came directly from [ST]." It is not clear what the Applicant means by this; the January 10, 2010 letter from ST preceded the emails in the records at issue by a year. It is also not clear how this comment relates to the Public Body's claim of privilege over the information withheld in the records.

[para 26] The Applicant likens the Public Body's response to its enquiries regarding the *Ashe* decision to the responses the B provided the Applicant in another matter,

relating to the *Arkininstall Inquiry Report* from the Alberta Law Enforcement Review Board. The Applicant cites page 43 of that report, which states:

CPS's reluctance is illustrated by its responses to letters and other queries about what it was doing. It rebuffed these inquiries, citing privacy concerns, and took the position that there had been no "official" or "formal" complaint. This completely ignored the fact that section 43(6) authorized CPS to initiate a complaint, regardless of whether someone has made an "official" or "formal" complaint. This stance on CPS's part was, at the very least, unfortunate.

[para 27] The Applicant also states in its rebuttal submission, that "[t]his is not the first time that [ST] went beyond providing legal advice under the guise of being the FOIP Manager or CPS counsel." With its rebuttal submission, the Applicant provided a copy of a request for inquiry it had submitted to this Office in 2013, regarding how the Public Body responded to a different access request made by the Applicant (resulting in Order F2018-72). It is not clear how that matter relates to the Public Body's application of section 27(1)(a) in this case.

[para 28] Possibly the Applicant is pointing to a pattern within the Public Body of dismissing enquiries on particular matters such as the *Ashe* decision. Whether or not such a pattern exists, the Public Body has responded to the Applicant in this case, and the question in this inquiry is whether the Public Body properly claimed privilege over the portions of emails on pages 5 and 6 of the records at issue.

[para 29] Possibly the Applicant is arguing that ST's role does not include providing advice on the matters discussed in the records at issue. However, the records indicate that ST was involved as part of her usual role, and the Public Body's affidavit supports that conclusion.

[para 30] Given the affidavit and the context of the redacted information, I accept that the redacted information consists of legal advice provided by Public Body counsel.

[para 31] The emails do not contain an express statement of confidentiality. The confidentiality of documents over which privilege is claimed may be implicit from the nature of the documents themselves (Order F2007-008) or from the circumstances under and, purposes for which, the legal advice was being sought or given (Order F2004-003).

[para 32] In this case, the context of the records indicates that the advice in the withheld portions of the emails was intended to be confidential. The Public Body has disclosed the portions of the emails that show to whom they were sent or copied. The email recipients were limited to Public Body employees who had been involved in responding to the Applicant's 2010 requests for information. From the nature of the records, I presume they were intended to be confidential and nothing before me rebuts that presumption.

[para 33] The evidence provided by the Public Body meets the requirements set out in *ShawCor* and is consistent with the test for finding solicitor-client privilege applies. I find that the Public Body has established its claim of privilege.

*Exercise of discretion*

[para 34] Section 27(1)(a) is a discretionary exception. However, past Orders of this Office have found that once solicitor-client privilege has been established, withholding the information is usually justified for that reason alone (see Orders F2007-014, F2010-007, F2010-036, and F2012-08 citing *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*).

[para 35] This approach was discussed with approval in *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10.

[para 36] As I have found that the Public Body properly claimed privilege, its exercise of discretion to withhold that information can be presumed to be appropriate.

**V. ORDER**

[para 37] I make this Order under section 72 of the Act.

[para 38] I uphold the Public Body's application of section 27(1)(a) to the information in the records.

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Amanda Swanek  
Adjudicator